

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERESA WEIMER)	
Claimant)	
VS.)	
)	
AMERICAN INSULATED WIRE)	Docket No. 251,348
Respondent)	
AND)	
)	
RELIANCE NATIONAL INDEMNITY CO.)	
c/o GALLAGHER BASSETT SERVICES, INC.)	
Insurance Carrier)	

ORDER

Claimant and respondent appeal the August 16, 2002 Award of Administrative Law Judge Jon L. Frobish. Claimant was awarded a 19 percent permanent partial general disability on a functional basis for the injuries suffered to her bilateral upper extremities through a series of accidents through November 6, 1999. Claimant contends she is entitled to a work disability under K.S.A. 1999 Supp. 44-510e. Respondent, on the other hand, argues the functional impairment determined by the Administrative Law Judge is not supported by the record and should be reduced to conform to the functional impairment rating provided by John B. Moore, IV, M.D., one of claimant's treating physicians. The Appeals Board (Board) held oral argument on February 11, 2003.

APPEARANCES

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Stephen J. Jones of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, at oral argument, the parties stipulated

that claimant was paid 62.41 weeks of temporary total disability compensation for the periods November 6, 1999 through May 26, 2000, and July 12, 2000 through March 3, 2001. The parties further stipulated that during this period of time, claimant continued to receive her fringe benefits, which would, therefore, not be included in claimant's average weekly wage, pursuant to K.S.A. 44-511 (Furse 1993), until claimant's termination of employment on November 14, 2001.

ISSUES

- (1) What is the nature and extent of claimant's injury and disability? Specifically, is claimant limited to an award based on her percent of functional impairment?
- (2) Did the Administrative Law Judge err in determining the functional impairment awarded claimant? Additionally, did the Administrative Law Judge violate the provisions of K.S.A. 1999 Supp. 44-510e(a), that requires competent medical evidence based on the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), in determining and computing claimant's whole body functional impairment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds the Administrative Law Judge's Award should be modified to find a 23 percent functional impairment, but should otherwise be affirmed.

Claimant began working for respondent on October 28, 1996, as an extrusion machine operator. Claimant's duties with respondent involved repetitive pulling, tugging and climbing. As a result of these activities, claimant began developing problems in her hands, upper extremities, neck and back. Claimant alleged, and respondent acknowledges, accidental injury arising out of and in the course of her employment each and every day through a series of injuries culminating on November 6, 1999.

Claimant was referred to numerous physicians, ultimately coming under the care of John B. Moore, IV, M.D., board certified in plastic and reconstructive surgery and surgery of the hand. Dr. Moore first saw claimant on January 28, 2000, for complaints in her hands, wrists, fingers, forearms and shoulders. He diagnosed bilateral carpal tunnel syndrome and possible bilateral cubital tunnel syndrome. Claimant also had some compression problems in the neck. Dr. Moore recommended and claimant underwent

bilateral carpal tunnel releases, with the left release in February of 2000 and the right release in March of 2000. Following these surgeries, claimant underwent physical therapy, returning to work on May 27, 2000. Dr. Moore rated claimant at 5 percent permanent partial impairment to the right upper extremity at the wrist and a 1 percent permanent partial impairment to the left upper extremity at the wrist, which combine for a 4 percent whole person impairment pursuant to the *AMA Guides* (4th ed.). Claimant was returned to work with a 10-pound lifting restriction and restrictions against repetitive gripping activities.

Claimant returned to work as a forklift driver which, according to claimant's testimony, she performed until July 12, 2000. The forklift driving job, in particular the vibrations of the forklift, caused claimant additional problems and she was taken off that job by Dr. Moore. As a result of the additional problems, claimant was referred for treatment to Edward J. Prostic, M.D., board certified in orthopedic surgery. Dr. Prostic diagnosed claimant with bilateral carpal tunnel syndrome, possible ulnar tunnel syndrome bilaterally, cubital tunnel syndrome on the left, rotator cuff tendinitis on the left and irritability of her cervical and thoracic spine. He treated claimant with cortisone injections to the shoulder, cubital tunnel and ulnar tunnels, and also used wrist splints and anti-inflammatory medication. He also prescribed strengthening exercises for claimant's shoulders. Dr. Prostic last examined claimant on January 23, 2001, at which time she no longer had complaints in the shoulders or cervical spine.

Dr. Prostic assessed claimant a 20 percent permanent partial impairment for each upper extremity, which combine, under the *AMA Guides* (4th ed.), to a 23 percent whole person functional impairment. He was provided a job task list from Karen Crist Terrill and testified that ten of the forty jobs on the task list were beyond claimant's physical capabilities, resulting in a 25 percent task loss. The original list contained forty-five tasks, but it was determined that five of those tasks were duplicates.

Both Dr. Moore and Dr. Prostic were provided videotapes of three jobs identified as stagger cutter, stripper cutter and metal spool assembler. Accompanying the videotapes were written job descriptions, detailing the activities required in these jobs. These videotapes and these job descriptions were prepared with Barbara Darnell, respondent's department manager, actually videotaping the jobs as Ms. Darnell was supervised by Lori Larkin, the respondent's human resources manager. Ms. Larkin was the person responsible for creating the job descriptions. Dr. Prostic, after reviewing the job descriptions and videotapes, opined that claimant was capable of performing all three jobs as depicted. Dr. Moore viewed the videotapes, finding claimant capable of performing the stripper cutter and stagger (step) cutter jobs. He expressed concern regarding the metal spool assembly job, as he felt it may be too repetitive.

Claimant contends the videotapes do not provide a true representation of the job duties. She contends the videotaped job activities were at a slower pace than normally

required in the job. Additionally, claimant objected that the tapes did not show moving pallets or making boxes. But Ms. Larkin and Ms. Darnell testified that the job activities depicted on the videotapes were accurate depictions of the jobs.

Claimant was returned to work for respondent on March 3, 2001, performing the jobs displayed in the videotapes. This transfer resulted in associate transfer evaluations being performed by respondent on March 17, 2001, and again on April 3, 2001. Ms. Larkin testified that anytime an associate transfer occurs, an evaluation after the first week and after the first 30 days is required. On both dates, claimant received a good report in all aspects of the job.

On April 21, 2001, claimant was transferred from the day shift to the night shift.

Respondent indicated that this transfer was necessitated by difficulties associated with the production on the night shift. Claimant was not the only employee transferred to the night shift at that time.

Between March 3, 2001 and April 20, 2001, claimant worked her regular job, missing only one day due to illness. After claimant was transferred to the night shift, between April 24, 2001 and July 13, 2001, claimant worked a total of eleven full days, with one day where she appeared for 30 minutes and then went home. Claimant was on vacation four days, the plant was shut down for two days, and claimant either called in or simply did not show for work twenty-one times. From July 14, 2001, through October 25, 2001, claimant did not appear for work, but did call in every day. After October 25, 2001, claimant stopped calling in and did not appear for work. On November 14, 2001, claimant was terminated for violating respondent's attendance policy.

Claimant was referred to Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation and a certified independent medical examiner, by the Administrative Law Judge on April 30, 2001. He diagnosed claimant with bilateral carpal tunnel syndrome post surgery and myofascial pain syndrome affecting the neck and bilateral shoulder girdles. He agreed with Dr. Prostin's 23 percent whole person impairment for the bilateral carpal tunnel syndrome, but added an additional 4 percent to the body for the myofascial pain syndrome in claimant's neck and shoulders. This combined to a 27 percent permanent partial whole person impairment pursuant to the AMA Guides (4th ed.).

Dr. Murati reviewed the task analysis provided by Karen Crist Terrill, opining claimant was unable to perform sixteen of the forty tasks listed, for a 40 percent loss of task performing abilities. Dr. Murati was also provided a copy of the videotapes of the three jobs in question, opining claimant could perform those three videotaped jobs as depicted. He testified claimant would be capable of performing the metal spool assembler job without rotation, but the stripper cutter and stagger cutter jobs would require rotation among the three.

Claimant was referred to orthopedic surgeon Bernard T. Poole, M.D., for an independent medical evaluation at respondent's request. Dr. Poole diagnosed thoracic outlet syndrome and residuals of bilateral carpal tunnel syndrome, assessing claimant a 5 percent permanent disability to each upper extremity for the carpal tunnel syndrome. While Dr. Poole did testify regarding claimant's functional impairment from the bilateral carpal tunnel syndrome, he does not specify in his report or in his testimony whether he used any particular version of the *AMA Guides* in order to reach that opinion.

The Administrative Law Judge, in the Award, found claimant to have a 10 percent impairment to each upper extremity which, when combined, created a 19 percent permanent partial general body disability. The Administrative Law Judge also does not specify what, if any, version of the *AMA Guides* was utilized in reaching this impairment opinion or whether the opinions of the doctors above discussed were utilized in creating this opinion. Additionally, it appears that there was no conversion of the two upper extremity 10 percent ratings to a whole body rating before the combination was generated.

K.S.A. 1999 Supp. 44-510e(a) defines functional impairment as follows:

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

In reviewing the various opinions, the Board finds the opinions of Dr. Prostic and Dr. Murati to be the most credible. Both agreed claimant suffered a 23 percent whole person impairment under the *AMA Guides* for claimant's upper extremity bilateral carpal tunnel conditions. The Board, however, rejects Dr. Murati's diagnosis of myofascial pain syndrome, as that condition was not diagnosed by any other examining or treating physician in this case. In addition, Dr. Prostic testified that when he last examined claimant in January 2001, she had no complaints to her shoulders or cervical spine.

K.S.A. 1999 Supp. 44-510e defines permanent partial general disability as:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

In determining what, if any, permanent partial general disability compensation claimant may be entitled to, the Board must consider K.S.A. 1999 Supp. 44-510e in light

of *Foulk*¹ and *Copeland*.² In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that the worker's post-injury wage should be based upon his or her wage-earning ability, rather than his or her actual wage, when he or she fails to make a good faith effort to find appropriate employment after recovering from his or her injuries.

Additionally, permanent partial general disability benefits may be limited to the functional impairment rating when a worker voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of claimant's pre-injury wage.³

A situation similar to this one arose in *Perez*,⁴ where the claimant was returned to work with the respondent and later terminated after missing 24 out of 57 possible work days subsequent to his return to work. The Court of Appeals, in *Perez*, found the claimant had failed to put forth a good faith effort after being returned to work for the respondent and was, thus, denied a work disability.

Here, claimant was returned to an accommodated position with respondent at a wage equal to 90 percent or more of claimant's average weekly wage on the date of accident. K.S.A. 1999 Supp. 44-510e further states:

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Here, claimant's termination of employment came about as a result of attendance problems generated by claimant. The Board finds claimant has failed to put forth a good faith effort in her return to employment. Accordingly, under *Copeland*, a wage must be imputed. In imputing the wage claimant was earning with respondent before her termination, the Board finds claimant retained the ability to earn 90 percent or more of her

¹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

² *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

³ *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, rev. denied 265 Kan. 885 (1998); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 886 (1999).

⁴ *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

average weekly wage on the date of accident and is, therefore, not entitled to a work disability. As such, claimant is limited to her functional impairment of 23 percent to the body as a whole.

The Board, therefore, finds that the Award of the Administrative Law Judge should be modified to award claimant a 23 percent permanent partial general body disability based on claimant's functional impairment, but denies claimant additional work disability for the above stated reasons.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated August 16, 2002, should be, and is hereby, modified and an award is granted in favor of the claimant, Teresa Weimer, and against the respondent, American Insulated Wire, and its insurance carrier, Reliance National Indemnity Company, c/o Gallagher Bassett Services, Inc., for an accidental injury sustained by a series of accidents through November 6, 1999.

Claimant is entitled to 62.41 weeks of temporary total disability compensation at the rate of \$297.46 per week in the amount of \$18,564.48, followed by 84.57 weeks of permanent partial general disability compensation for a 23 percent permanent partial general disability on a functional basis. Pursuant to the stipulation of the parties, claimant's weekly rate of \$297.46 will increase effective November 14, 2001, to \$357.16. On that date, claimant's average weekly wage would include the \$89.54 stipulated fringe benefit cost, raising claimant's wage to \$535.71. Claimant would, therefore, be entitled to 36.57 weeks of permanent partial general disability compensation at the rate of \$297.46 per week in the amount of \$10,878.11 through November 13, 2001. Beginning November 14, 2001, claimant would be entitled to an additional 48 weeks of permanent partial general disability compensation at the new rate of \$357.16 per week in the amount of \$17,143.68, for a total award of \$46,586.27.

As of the date of this award, the entire amount is due and owing in one lump sum minus any amounts previously paid.

The Award of the Administrative Law Judge is otherwise affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of March 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Stephen J. Jones, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation